Supreme Court, U. S.
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No. 80-133

In the Supreme Court of the United States

OCTOBER TERM 1980

LEVITT & SONS OF PUERTO RICO, INC.,
PETITIONER,

v.

COMMERCIAL INSURANCE COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Respondent disagrees with the question presented by Petitioner because it is misleading. The question should read as follows:

Whether the judgment rendered against the Petitioner, who waived its right to a trial by agreeing to submit its controversy with Respondent by briefs to the Court for Resolution, and is based on the entire file including the submitted briefs, violates the due process clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Question Presented	I
Opinions Below	2
Jurisdiction	2
Counter-Statement of the Case	2
Proceedings in the Court of Appeals	5
Reasons for Denying the Writ	6
Argument	6
Conclusion	7

TABLE OF CITATIONS

Cases

Alyeska Pipeline Service v. *The wilderness Society*, 421 U.S. 240 (1975) 6

Berrios Rivera v. *British Ropes, Ltd.*, 575 F.2d 966 (1st Cir. 1978) 2, 3

Thompson v. *City of Louisville*, 362 U.S. 199 (1960) 6

Constitutional Provision

United States Constitution
Amendment V I

Statutes

28 U.S.C. §1254(1) 2

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Respondent Commercial Insurance Company respectfully prays that the Writ of Certiorari requested by Petitioner Levitt & Sons of Puerto Rico, Inc. to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 8, 1980 and an order on Petition for Rehearing entered April 30, 1980 be denied.

OPINIONS BELOW

The Opinion of the Court of Appeals of April 8, 1980 is unpublished (Lev. br Ap. A, pg 7).[1] A prior opinion of the Court of Appeals, relevant to issue raised in the Petition is reported *sub nom. Berrios Rivera* v. *British Ropes, Ltd.*, 575 F. 2d. 966 (Com br. Ap. A, pg. 8). the last opinion of the District Court is unpublished (Lev. br. Ap. C, pg 17).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on April 8, 1980. A timely petition for rehearing was denied on April 30, 1980 (Lev. br. Ap B, pg. 15). This Court's jurisdiction is invoked under 28 USC 1254 (1).

COUNTER-STATEMENT OF THE CASE

This case neither involves a bizarre situation nor a clear violation of constitutional rights as to warrant review by this Court. It does involve a situation where petitioner waived its right to a trial by agreeing to submit for adjudication of a remaining controversy to the District Court by briefs. The matter was indeed submitted by briefs to the District Court who properly resolved the controversy against petitioner. Because petitioner's Statement of Fact is so incomplete and misleading, we have no alternative but to add and clarify some facts which were highly relevant in the resolution of the case below.

This is a diversity jurisdiction case that involves a personal injury claim against defendants British Ropes, Ltd., and Harnishfeger Corporation. A third party action seeking indemnity was filed against petitioner, Levitt & Sons of Puerto Rico, Inc.

[1] For the purposes of clarity we shall cite the documents contained in the appendix of this brief as (Com. br. Ap. pg. __) and the appendix added to Levitt's brief as (Lev. br ap. pg. __).

(Levitt). Levitt then filed an additional third party action against respondent Commercial Insurance Company (Commercial) also seeking indemnity because of the existence of a Hold Harmless Agreement in favor of Levitt. Thereafter, Commercial counter-claimed Levitt seeking recovery of the sums paid as a result of a settlement. Commercial pleaded there was an express agreement between Commercial and Levitt to the effect that the successful party would reimburse the other for the sums paid in the settlement.

On March 29, 1977, the District Court entered an order (Com. br. Ap. B. pg. 16), confirming a settlement agreement, wherein defendants, the third party defendant (Levitt), and the additional third party defendant (Commercial) all agreed to contribute the sum of $34,000.00 each to settle plaintiff's claim. Levitt and Commercial filed an appeal of that judgment on the grounds that a settlement had never been reached. The Court of Appeals held that a settlement was in fact reached, *Berrios Rivera* v. *British Ropes, Ltd.* 575 F. 2d. 966 (1st Cir. 1978). (Com. br. Ap. A, pg. 8). The Court of Appeals noted that Levitt and Commercial had retained the right to submit their cross claims to the District Court, 575 F. 2nd at 969, (Com. br. Ap. A, pg. 13). The case was returned to the District Court and it adjudicated the cross claims between Levitt and Commercial. Pursuant to its Opinion and Order of June 28, 1979 (Lev. br. Ap. C. pg. 17), judgment was entered in favor of Commercial compelling Levitt to reimburse Commercial the sums paid to plaintiff by Commercial as part of the overall settlement. Levitt then timely filed an appeal of that judgment. However, the Court of Appeals confirmed the judgment of the District Court. (Lev. br. Ap. A, pg 7).

The order of the District Court dated March 29, 1977, issued by Hon. Judge James Watson, stated:

> "Levitt and Sons of Puerto Rico, Inc. and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs."

Levitt never moved the District Court for modification of that portion of said order, nor did Levitt ever raise that holding as an issue during the previous appeal to the Court of Appeals. It did for the first time on the last appeal.

On May 31, 1977, the District Court, Chief Judge Jose V. Toledo, issued an order (Com. br. Ap. C, pg. 18) confirming the settlement and specifically recognizing that Levitt and Commercial had agreed to submit for adjudication their claims against each other to the court by briefs.

Again, Levitt did not move for modification of that order, nor did it raise that point as an issue on appeal during the previous appeal.

The Court of Appeals, in its previous opinion, recognized that Commercial had reserved its right against Levitt, and made specific mention of the aforesaid order of May 31, 1977, stating that defendants were to file cross motions and memoranda regarding apportionment of damages between them; 575 F.2d at 968, (Com. br. Ap. A, pg. 12). It further noted that "they (Commercial & Levitt) retain the right to submit their claims against one another to the Court for judicial determination", 575 F. 2d at 969, (Com. br. Ap. A, pg. 13).

During oral argument of the previous appeal, Levitt never argued that there was any dispute over the agreement between Commercial and Levitt as to submitting the claims against one another to the court, nor did Levitt ever ask for reconsideration of the Court of Appeals' holding on that point.

At a chance meeting with Levitt's attorney, on or about August, 1978, Commercial first learned that Levitt's position was that Levitt was seeking recovery from Commercial, but

that Commercial was not seeking recovery from Levitt. Commercial promptly moved for an in chambers conference. As a result of that conference a counter-complaint (Lev. br. Ap. D, pg. 23) against Levitt was allowed wherein Commercial sought recovery of the $34,000.00 it paid as part of the overall settlement agreement. Paragraph four (4) of Commercial counter-complaint was admitted to by Levitt in its answer to counter-complaint (Lev. br. Ap. E, page 25); said paragraph reads:

> "4—That as part of the settlement it was accorded that the dispute between Levitt and Commercial would continue".

On June 28, 1979, the District Court, Hon. Chief Judge Jose V. Toledo, in a footnote, found that the record "reflects a clear inference that the agreement between Levitt and Commercial was one of winner take all, i.e. if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00. Hence, a judgement against Levitt was entered by the District Court. was one of "winner take all, i.e. if Levitt's position were upheld Commercial would reimburse Levitt the $34,000.00, otherwise Levitt would reimburse Commercial $34,000.00." (Lev. Br. App. C page 18). Hence, a judgment against Levitt was entered by the District Court.

PROCEEDINGS IN THE COURT OF APPEALS

The judgment was appealed to the United States Court of Appeals for the First Circuit. There, appellant "stressed" in only one paragraph of its brief that there was no basis in the record for the District Court to infer that the agreement between Levitt and Commercial was one of "winner take all". It alleged that the record was devoid of anything to sustain that inference even though a clear remark to that effect is contained in a District Court order and petitioner, in its answer to the counter-complaint filed by respondent, admitted the existence of said agreement.

The Circuit Court, in an unpublished opinion, correctly found that "there was solid basis" for the District Court's order against Levitt and upheld the judgment (Lev. br. Ap. A, pg. 7). Levitt then filed a Petition for Rehearing which was duly denied by the First Circuit (Lev. br.Ap. B, pg. 15).

REASONS FOR DENYING THE WRIT

It is unequivocally clear that there was an agreement between petitioner and respondent, with the consent of the District Court, to submit by briefs the controversy between them for resolution. Two District judges and the Court of Appeals for the First Circuit, on two different occasions, thoroughly reviewed the record and reached the same conclusion. There is nothing in the record which indicates that said agreement was never made.[2]

ARGUMENT

The case of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) is not applicable to the present case. In that case, a conviction was set aside by this Court because there was no evidence whatsoever of criminal misconduct. The present case, involves a civil case, not a criminal one, the parties agreed to submit the controversy to the Court by briefs, the briefs were in fact submitted and the Court resolved the controversy based on the whole record.[3]

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[2] It is obvious petitioner's claim of violation of due process is so frivolous that it constitutes bad faith and thus it should be ordered to pay attorneys' fees pursuant to *Alyeska Pipeline Service* v. *The Wilderness Society*, 421 U.S. 240 (1975)

[3] It should be noted that petitioner had filed a petition for Summary Judgment against respondent requesting, as a matter of law, a partial judgement in its favor because there was no fact issue in controversy.

The Court of Appeals assumed, in disposing of this case, that Levitt had denied the existence of the agreement in its Answer to Counter-Complaint. However, upon examining said answer (Lev. br. Ap E, pg. 25) we find that they did admit the existence of the agreement. The facts speak for themselves.

It is obvious that the Courts below fully considered and correctly decided the issues, that petitioner's argument is without merit, whether or not the decisions below were correct, that the issues are not important enough to warrant review, and the questions presented were not raised or preserved below, or were waived. Each and every one of these reasons, by themselves or in toto, are sufficient to deny the petition.

We must remember that Petitioner never requested a review by this Court of the prior decision of the Court of Appeals upholding the existence of an agreement. Hence, petitioner is stopped from challenging now that prior decision because it is and should be considered the law of the case.

In conclusion, petitioner's contention is merely that this Court negate an agreement voluntarily entered by petitioner waiving its right to a jury because the final judgment was contrary to its own interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied and petitioner should be assessed appeal costs and attorneys' fees.

Respectfully submitted,
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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 77-1257

JOSE BERRIOS RIVERA, etc.,

PLAINTIFFS, APPELLEES,

v.

BRITISH ROPES LTD., et al.,

DEFENDANTS, APPELLEES,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

v.

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT, APPELLANT,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

No. 77-1258

JOSE BERRIOS RIVERA, etc.,

PLAINTIFFS, APPELLEES,

v.

BRITISH ROPES LTD., et al.,

DEFENDANTS, APPELLANTS,

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF, APPELLEE,

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[HON. JOSE V. TOLEDO, *U.S. District Judge*]

Before

CAMPBELL, BOWNES & MOORE,*

Circuit Judges.

Charles A. Cordero, with whom *Ramon Humberto Vargas* was on brief, for appellants.

Jaime Pieras, Jr., for appellee Harnischfeger Corporation.

Gabriel Hernandez Rivera, with whom *Feldstein, Gelpi & Hernanadez* was on brief for plaintiffs, appellees.

May 8, 1978

MOORE, *Circuit Judge:*

In this personal injury action, jurisdiction over which is based on diversity between the parties, plaintiff, who was rendered a paraplegic when a cable on a crane snapped, finally succeeded in this action, after three years of discovery and numerous postponed trial dates, to obtain a settlement from the defendant British Ropes, Ltd. (the cable manufacturer) and Harnischfeger Corporation (the crane manufacturer), joined by third-party defendant Levitt & Sons of Puerto Rico, Inc. (the prime contractor) (Levitt) and additional third-party defendant Commercial Insurance Co. (the liability insurer of the subcontractor, Insular Construction Company). The settlement, according to the district judge, was agreed to after a motion to dismiss based on *res judicata* was denied, and after months of settlement negotiations. An order was entered on March 29, 1977 in the sum of $136,000 to be distributed in equal sums of $34,000 among the four co-defendants and third-party defendants. The settlement order included a provision for compensation due to plaintiff's attorney and

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* Of the Second Circuit, sitting by designation.

provisions pertaining to amounts to be paid to plaintiff's six minor children, who claimed derivatively against the defendants; these amounts had been approved by the court and by the Department of Justice of the Commonwealth of Puerto Rico, which filed its approval papers on February 18, 1977.

After the settlement order was entered on March 29, the co-defendant British Ropes filed a motion for reconsideration on April 7, alleging that its share of the settlement was only $30,000. On April 12, the court, over plaintiff's objections, entered an order reducing the contribution of British Ropes to the amount it claimed was due from it. Thereafter, on April 20, Commercial Insurance, which reserved the right, when settlement was entered, to have its third-party dispute with Levitt determined by the court (see Order dated May 31, 1977, Appendix at 48-53), filed a motion alleging that "in view of the 'chipping' tactics" of British Ropes, the order of March 29 should be vacated, and the case should be set for trial. On the same day that Commercial filed its motion, defendant Harnischfeger filed a "Motion Executing Settlement", stating that, in order to satisfy' plaintiff's objections to the reduction of the total amount paid to him and his children, it (Harnischfeger) agreed to increase its share of the settlement to $38,000, and thereby cure the deficiency. Harnischfeger's papers impressed upon the court that there had, in fact, been an agreement, and that the motion of Commercial was untimely since it was filed well after the time period, commencing with the filing of the March 29 order of settlement, permitted by the rules for contesting the judgment.

On April 22, 1977, the district court denied the motion of Commercial and held that the grievance would be cured by entering an order reapportioning the liabilities of all of the defendants: British Ropes was to pay $30,000; Harnischfeger, in conformance with its motion would be liable

for $38,000, and Commercial and Levitt were both to be held to $34,000 each, as per the March 29 order.

On April 27, Levitt filed a motion "withdrawing its offer of settlement"; the next day, Commercial and Levitt filed separate notices of appeal from the March 29 order and from subsequent orders affecting that order. That same day, Commercial filed a motion for reconsideration and to vacate the settlement orders. Although the district court found itself without jurisdiction to consider the motion to vacate since the notice of appeal had been filed, Chief Judge Toledo, in an opinion dated May 31, 1977, chronicled the events that occurred subsequent to the filing of the notices of appeal and noted that, had he retained jurisdiction, he would have denied the motion to vacate.

As a first ground of appeal, appellants Commercial and Levitt urge that the orders of March 29 and April 22 (modifying the settlement), and all subsequent orders affecting the settlement issue, should be reversed on the ground that no settlement had in fact been reached, appellants major contention is that Commercial's attorney was not present at the second settlement conference, held on February 18, 1977, when the alleged settlement was reached, and that no formal releases or stipulations for judgment were ever drafted by the parties' attorneys, all of which, they argue, indicates that there was never an agreed-upon settlement in the first instance. Appellants claim that, at the settlement conferences, there was only an agreement to *recommend* settlement in four equal shares to the various parties, but that the district judge erred in entering the settlement orders because there was no true consent.

Plaintiff-Appellee objects to the tactics of the appellants/third-party defendants, pointing to specific representations of those parties in their motion papers acknowledging that there had been agreement to pay $136,000 to the plaintiff. Indeed, the docket entry for February 18, 1977 recites that a settlement conference was called, that the settlement of

the minors' claims was approved pursuant to the Certificate of Approval of the Department of Justice of the Commonwealth of Puerto Rico, and that defendants were to file cross motions and memorandam regarding apportionment of damages be tween them. Furthermore, plaintiff refers to a motion filed by appellant Levitt on May 3, 1977, entitled "Motion for a Special Hearing and Further Proceedings Consistent with Settlement Agreement", in which Levitt stated that there had been specific agreement that it would share in the liability to the extent of $34,000.

We are persuaded that the settlement orders must be upheld. First, in our task of reviewing the findings and orders of the district court, we must presume regularity, and give due regard to the district judge's proximity to the situation. Second, it is the burden of the appellants to demonstrate that the ruling of the district court was erroneous, and the factual finding underlying the judgement—*i.e.*, that there was an agreed settlement—cannot be set aside unless it is "clearly erroneous". Fed.R.Civ.P. 52(a). We think that in this case, appellants Commercial and Levitt have not met their burden, and we thus cannot say that the district court erred in sustaining the settlement. Indeed, the facts in the record support this conclusion: first, appellants were served with plaintiff's motion of February 15, 1977 for approval of the settlement of the claim of the minor children, and were later served with an order dated February 18 approving the settlement and directing them to file cross motions and memoranda. The circumstances clearly indicate that a settlement had been reached; if there was none, it is at least unusual that no objections were made at this time. Second, we note that the appellants in this case are Levitt and Commercial,[1] *neither* of whom

[1] It is noteworthty that Levitt, in its motion dated May 3, 1977, specifically referred to the "settlement agreement" earlier reached and Commercial, in its motion of April 20, also alluded to the settlement in the sum of $136,000.

was affected by the court's order modifying the distribution of payments; further, they retain the right to submit their claims against one another to the court for judicial determination. Third, neither of the appellants found any reason to complain prior to the timely motion for reconsideration made by British Ropes, which is not a party to this appeal; indeed, Commercial's motion to vacate the March 29 settlement order was not filed until April 20, and it was not predicated on the ground that no settlement had been reached, but was rather an objection to the "chipping tactics" of British Ropes; if this was a ground for grievance as to appellants, it was cured by defendant Harnischfeger's willingness to pay $4,000 more than it had originally agreed to do.

Finally, we think that the record shows an independent reason for appellants' attempt to relieve themselves of their settlement obligations: According to the Motion of defendant Harnischfeger dated May 11, 1977, opposing the motion of appellants to withdraw their "offers" of settlement it appears that there was a decision by the Supreme Court of Puerto Rico rendered in April, 1977—the month after the settlement order of March 29 was entered—in which the court discussed the obligations "of owners as to the employees of their contractors and sub-contractors". (See Appendix at 34, Informative Motion of Harnischfeger.) As Harnischfeger pointed out, it is not unlikely that that decision, which might have had some effect in a diversity case, may well have entered into the attempts of the contractor and insurer for the sub-contractor to seek more favorable terms by forcing the issues to trial. However, once bound by a settlement given court appoval, these litigants should not be permitted to escape their obligations to plaintiff. Again we note that the appellants retain the right to submit their cross claims to the court; thus, if the controlling law has shifted their liabilities, the district court will so determine. However,

their obligations to the plaintiff should not be disturbed under the circumstances.

Although the underlying issue is the validity of the settlement, appellants devote the major portion of their appellate arguement to the propriety of the district court's refusal to dismiss the action on grounds of *res judicata*. The motion to dismiss was precipitated by virtue of the fact that plaintiff, concurrently with commencing the federal action against these defendants, brought an identical action in the Commonwealth courts. Some of the defendants never filed an answer in that court action. The Commonwealth court once dismissed the action for lack of prosecution, but reinstated it on plaintiff's motion. Thereafter, since the suit remained dormant, the court again dismissed the action under Rule 11 of the Administrative Rules for the Court of First Instance of Puerto Rico, which provides:

> "The judge in charge of administrative matters . . . shall dismiss, and order the entry of the dismissal judgment, of all civil matters pending in which there has been effected no action by any of the parties during the past six (6) months. . . .A dismissal under this rule shall constitute res judicata."

Plaintiff never appealed this dismissal since, by the time it was entered, the federal action was well under way. However, when Commercial was brought into the action by way of a third-party complaint, it moved for dismissal on *res judicata* grounds. The motion was denied, and the denial was reaffirmed on reconsideration, on the ground of lack of timeliness and on the ground that, under the controlling law of Puerto Rico, the defense was not to be allowed if to do so would permit an injustice.

Although appellants contest the propriety of the district court's refusal to apply *res judicata* in the instant case, we think that the decision is wholly supportable by Puerto

Rican law, amply documented by the district court. We of course, give weight to the district judge's analysis of the local law with which, as a member of the bar of Puerto Rico, he is especially familiar. *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977); C. Wright, *Law of Federal Courts* 271 (3rd ed. 1976). *See, also, Bernhardt* v. *Polygraphic Co.* 350 U.S. 198, 204-05 (1956) (decision of local federal judge on question of local law to be given special weight); *accord, Sauerhoff* v. *Hearst Corp.*, 538 F.2d 588, 591 (4th Cir. 1976); *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550, 554 (2d Cir. 1967); *but see, Luke* v. *American Family Mutual Insurance Co.*, 476 F.2d 1013, 1019-20 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973) (although special weight given, circuit court is not bound). We believe that Chief Justice Toledo reached a correct interpretation of the law of Puerto Rico on this point. The courts of Puerto Rico have recognized that in certain cases, the policies of *res judicata* are not well served by literal application of the procedural rules of the courts. In the case at bar, defendants were not, in fact, put to the task of responding to multiplicitous suits: they did not even plead in the state action, and were well aware, it seems, that the federal action was being actively litigated. Their right, protected by the doctrine of *res judicata*, not to be harassed by successive litigation was simply not involved in this instance.

The district court correctly recognized this point, and properly found that an injustice would be worked were dismissal of plaintiff's federal suit to be permitted.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 528-73

JOSE BERRIOS RIVERA, for himself and on behalf of his minor children, Jose Israel, Celys Yolanda, Frank Reinaldo, Luis Armando, Carmen Beatriz and Lydia Enid Berrios

PLAINTIFF

v.

BRITISH ROPES, LTD., etc.

DEFENDANTS

v.

HARNISCHFEGER CORPORATION

DEFENDANT AND THIRD PARTY PLAINTIFF

v.

LEVITT & SONS OF PUERTO RICO, INC.

THIRD PARTY DEFENDANT

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY

ADDITIONAL THIRD PARTY DEFENDANT

ORDER

At the settlement conferences held in the Judge's chambers on February 1st, and February 18th, 1977, the parties agreed to settle this action for the total sum of One Hundred Thirty Six Thousand Dollars ($136,000.00) to be paid to the plaintiff as follows:

Jose Berrios Rivera	$124,000.00
Jose Israel Berrios (minor)	2,000.00
Celys Yolanda Berrios (minor)	2,000.00
Frank Reinaldo Berrios (minor)	2,000.00
Luis Armando Berrios (minor)	2,000.00
Carmen Beatriz Berrios	2,000.00
Lydia Enid Berrios (minor)	2,000.00
	$136,000.00

and the defendants agreed to pay the total settlement amount as follows:

British Ropes, Ltd.	$34,000.00
Harnischfeger Corporation	$34,000.00
Levitt & Sons of P. R., Inc.	$34,000.00
Commercial Insurance Co. of Newark, N.J.	$34,000.00
	$136,000.00

Levitt and Sons of Puerto Rico, Inc., and Commercial Insurance Company of Newark, New Jersey agreed to submit for adjudication their claims against each other to this Court by briefs.

Due deliberation having had on the above agreements, it is now,

ORDERED that the following defendants pay JOSE BERRIOS RIVERA and his attorneys FELDSTEIN, GELPI, TORO & HERNANDEZ the sum of $136,000.00 as follows:

British Ropes, Ltd.	$34,000.00
Harnischfeger Corporation	$34,000.00
Levitt & Sons of P. R.,Inc.	$34,000.00
Commercial Insurance Co. of Newark, N.J.	$34,000.00
	$136,000.00

and it is further,

ORDERED that in compliance with this Court's order of February 18, 1977 JOSE BERRIOS RIVERA shall pay the law firm of FELDSTEIN, GELPI, TORO & HERNANDEZ the sum of $3,960.00 for work performed on behalf of the six (6) minors, and it is further,

ORDERED that in compliance with the aforesaid order, JOSE BERRIOS RIVERA shall use the sum of $8,040 from the total settlement paid to him for the sole use and benefit of said minors.

San Juan, Puerto Rico, this 29th day of March, 1977.

/s/ JAMES WATSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 528-73

JOSE BERRIOS RIVERA, ETC., ET AL,

PLAINTIFFS

v.

BRITISH ROPES LTD., ET AL,

DEFENDANTS

v.

HARNISCHFEGER CORPORATION,

DEFENDANT AND THIRD PARTY PLAINTIFF

v.

LEVITT & SONS OF PUERTO RICO, INC.,

THIRD PARTY DEFENDANT

v.

COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,

ADDITIONAL THIRD PARTY DEFENDANT.

ORDER

After the parties had informed the Court that a settlement had been reached in the present case, judgment was entered on March 29, 1977 in the sum of $136,000.00 to be distributed in equal sums of $34,000.00 bv the four codefendants and third party defendants. Thereafter, on April 7, 1977, codefendant British Ropes Ltd. filed a motion for reconsideration alleging that its share of the settlement was only $30,000.00. On April 12, 1977, the Court entered an Order reducing the contribution of British Ropes to $30,000.00. Commercial Insurance Company of Newark, New Jersey, thereafter filed a motion alleging that "in view of Civil No. 528-73 the tactics of British Ropes Ltd.," it would only pay $30,000.00 of the settle-

ment judgment. On April 22, 1977, Harnischfeger Corporation filed a motion agreed to by plaintiffs to the effect that it would pay $38,000.00 instead of $34,000.00.

On April 22, we issued an Order denying Commercial's motion as untimely and because the grievance alleged had been cured by the fact that Harnischfeger had assumed the obligation to pay the difference of $4,000.00.

On April 27, 1977, Levitt & Sons of Puerto Rico, Inc. filed a motion withdrawing its offer of $34,000.00 in settlement. On April 28, 1977, Commercial Insurance and Levitt & Sons filed separate notices of appeal informing the Court that they were appealing to the United States Court of Appeals for the First Circuit from the Order of March 29, 1977 and from the subsequent orders of the Court affecting or in regard, to said Order of March 29. On that same date (April 28, 1977), Commercial filed a motion for reconsideration and to vacate orders urging for the vacation of this Court's Orders of March 29, April 12, April 22 and April 26. In this motion attorney for Commercial states that he was not present at the settlement conference held on February 18, 1977 and referred to in the judgment of March 29, 1977. We are urged by Commercial to reconsider said orders notwithstanding the fact that a notice of Appeal has been filed, alleging that under Rule 60(a) of the Federal Rules of Civil Procedure we retain jurisdiction to correct any errors in the judgment before the appeal is docketed in the appellate court.[1] On May 11, 1977, Harnischfeger filed an informative motion and an opposition to Levitt's withdrawal of offer wherein it stated its view that a settlement had in fact been reached and that it was legally binding. On May 19, 1977

[1] Following the chronological statement of events, on May 4, 1977 Levitt & Sons filed a motion requesting a Special Hearing and further proceedings consistent with the settlement agreement wherein it requested a hearing for the litigation and adjudication of Levitt's cross claim against Commercial. This hearing was set for June 3, 1977 at 9:30 a.m.

plaintiffs filed a motion in response to codefendants' various motions wherein it requested the Court to deny the motions filed by Commercial and Levitt & Sons. Finally, on May 19, 1977, Commercial filed a reply to Harnischfeger's motion dated May 11.

It seems to us that the above sequence of events, although giving an impression of complexity and dubiousness, are all dependent upon one central question: whether a settlement agreement was reached upon to give way to the Order of March 29, 1977. Regretfully, the settlement conferences referred to in the Order of March 29, 1977 were not conducted under the supervision of the undersigned judge. However, the same were conducted by the Hon. James L. Watson and an Order was signed to said effects. Thereafter, upon British Ropes' motion seeking a reduction of its contribution from $34,000.00 to $30,000.00, Judge Watson granted the same. Thereafter, the undersigned judge intervened by issuing an order approving of the reapportionment of contribution whereby Harnischfeger agreed to pay the additional $4,000.00.

Although none of the parties have so argued, in order for the Order of March 29, 1977 be null some irregularity must have taken place. No one has so stated and we will not so assume, in absence of any allegation on evidence to that effect. The Honorable Judge Watson presided over said settlement conferences and the fact that attorney for Commercial was not present at the meeting of February 18, 1977, does not preclude the possibility that his agreement to pay $34,000.00 was obtained at a previous meeting held on February 1, 1977. In any event, we have to presume the validity of said settlement and of the Order issued on March 29, 1977 in the absence of any evidence to the contrary.

We further find that from those settlement conferences as they are reflected on the documents in the record of this case the only issue as to the terms of the settlement was the amount

to be finally paid by British Ropes which issue was solved by the Order of Judge Watson reducing said contribution to $30,000.00.

In this case there was a settlement agreement to end a judicial proceeding, as such, it is a contract of compromise as that provided for by the Puerto Rico Civil Code, Title 31, Laws of Puerto Rico Annotated, Section 4821 et seq. See in this regard *Diaz Torres* v. *Rivera*, 96 P.R.R. 548 (1968).

Section 4828 of Title 31 of Laws of Puerto Rico Annotated, provides:

> "A compromise, in which error, deceit, violence, or forgery of documents is involved, shall be subject to the provisions of section 3404 (stating when consent is void) of this title.
>
> Nevertheless, one cf the parties cannot set up an error of fact against the other, if by reason of a compromise, the latter has withdrawn from a suit already begun."

In the present case there was no error or if there was it was cured by Judge Watson's second order and no allegation of deceit, violence or forgery, and more important by the settlement order of March 29, 1977 a suit already begun, and set for trial, was avoided.

Further, it has been held that a doubtful claim, that is, one in which a party could possibly end up paying more than it should or paying when it was not bound by law to pay, is sufficient to support a settlement agreement. *McCormick* v. *McCormick*, 52 P.R.R. 669 (1938). It should be borne in mind that the consideration of a settlement contract, or compromise, is the avoidance of the provocation of a suit or the termination of one that has already been instituted. See Title 31, Laws of Puerto Rico Annotated, Section 4821. We find such consideration here, and the fact that the claim was later rendered dubitable by an opinion of the Supreme Court should have no bearing on the validity of said settlement agreement.

We are told by Commercial that we have jurisdiction over the present case under Rule 60(a) of the Federal Rules of Civil Procedure. However, said rule pertain to clerical errors and, as such, it is not the proper vehicle to obtain a change of a substantive ruling as that sought by movant herein. *Gilroy* v. *Erie Lackawana R. Co.*, 44 F.R.D. 3 (DC N.Y., 1968). We therefore find ourselves without jurisdiction inasmuch as said order of March 29, 1977 is appealed to the Circuit Court. However, we have chosen to analyze the issue in the preceding pages and hereby certify to the Court of Appeals that, had we retained jurisdiction, we would have *denied* Commercial's and Levitt's motions for the above stated reasons.

There is however an error in this case which is correctable by us at the present moment under the above mentioned Rule 60(a). That is our Order of April 26, 1977, whereby we rendered as moot the controversy between Commercial and Levitt. The vacation of such order is not a change of a prior substantive ruling. Our determination of mootness in our Order of April 26, 1977, was a regrettable oversight of the terms of the Order of March 29, 1977, whereby Levitt and Comercial had "agreed to submit for adjudication their claims against each other to this Court by briefs".

Wherefore, in view of the foregoing, our Order of April 26, 1977 holding as moot the controversy between Levitt and Commercial, is hereby vacated. The record of this case shall be remitted to the Court of Appeals so that the appeal of the same is perfected.

IT IS SO ORDERED.

San Juan, Puerto Rico, May 31, 1977.

JOSE V. TOLEDO
Chief U.S. District Judge